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No. 736
JOINT APPENDIX

IN THE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13651

TRUCK DRIVERS AND HELPERS LOCAL UNION 728 (formerly Local Union 859) OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside and on Petition for Enforcement of an Order of the National Labor Relations Board

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Decision and Order

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., GEORGIA BRANCH	Case No. 10-CC-79

Upon a charge duly filed on June 28, 1954, by Associated General Contractors of America, Inc., Georgia Branch, the General Counsel of the National Labor Relations Board, herein called the General Counsel, by the Regional Director of the Tenth Region, issued a complaint dated July 28, 1954, against Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, hereinafter referred to as Respondent, alleging that it has violated Section 8(b)(4)(A) of the National Labor Relations Act, as amended, by inducing and encouraging employees of various employers to engage in

strikes or concerted refusals in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any service, with an object of forcing such employers to cease doing business with Campbell Coal Company, hereinafter referred to as Campbell. Copies of the complaint and Notice of Hearing were duly served on the Respondent on or about July 28, 1954. On August 6, 1954, the Respondent filed its answer to the complaint.

Thereafter on September 9, 1954, the parties entered into a stipulation setting forth an agreed statement of facts. The stipulation provided that the parties thereby waive their rights to a hearing, to the taking of testimony before a Trial Examiner of the Board, to issuance of an Intermediate Report and to the filing of exceptions. The Stipulation further provided that, upon such stipulation, the charge, Affidavit of Service of the charge, complaint, Notice of Hearing, Affidavit of Service of the complaint and Notice of Hearing and the Respondent's answer, the Board may make findings of fact, and conclusions of law, and may issue a Decision and Order as if the same facts had been adduced in open hearing before a duly authorized Trial Examiner of the Board.

The aforesaid Stipulation is hereby approved and accepted and made a part of the record in this case. In accordance with Section 102.45 of the National Labor Relations Board Rules and Regulations this proceeding is duly transferred to, and continued before, the Board.

Upon the basis of the aforesaid Stipulation and the entire record in the case, the Board, having duly considered the briefs filed by the parties, makes the following:

Findings of Fact

I. The Business of the Employer

Campbell Coal Company is a Georgia corporation with its principal office and places of business in that state. It is engaged in the wholesaling and retailing of building materials, including ready-mixed concrete. During the past year Campbell purchased, and caused to be shipped to its establishments at Atlanta, Ga., directly from points outside of the State of Georgia, materials valued in excess of $1,000,000. During the same period, Campbell sold and shipped directly to points outside the State of Georgia materials valued in excess of $50,000.

We find that Campbell Coal Company is engaged in commerce within the meaning of Section (2) (6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. The Respondent Labor Organization

Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, is a labor organization within the meaning of Section 2(5) of the Act.

III. Unfair Labor Practices

Campbell operates two ready-mix concrete plants in the Atlanta, Ga., area where it employs, among others, truck drivers who drive the trucks by which Campbell delivers its ready-mix to various construction sites in that area. These

truck drivers enter and leave the ready-mix plants several times during the course of each working day. At the delivery points for the ready-mix, the truck drivers, at the direction of the contractors on the job sites, operate the unloading mechanisms of the truck so as to place the ready-mix at places and in receptacles designated and provided by the contractors. A frequent method of unloading is to pour the mixture into forms so placed that the mixture, when dry, becomes a part of the structure of the project. The drivers spend approximately 25 per cent of their working time at the plant, 25 per cent en route and approximately 50 per cent at the construction sites.

From on or about June 9, 1954, until at least September 8, the date of the Stipulation, the Respondent has been on strike against Campbell because of the discharge of a number of Campbell's ready-mix truck drivers. The Respondent has continuously, at all times material, picketed Campbell's two ready-mix plants. In addition, the Respondent's pickets have followed some of Campbell's trucks from the ready-mix plants to various construction projects in the area where Campbell's trucks make deliveries, although the Respondent has no dispute with any of the contractors on such projects. The pickets carried signs which read:

> Employees of Campbell Coal Company on strike in protest of discharges against Union employees. Sales Drivers, Helpers and Building Construction Drivers, Local 859, AFL.

The picketing continued only so long as Campbell's trucks remained on the construction sites and was confined to the immediate area of the truck, or as close as the pickets could get without trespassing on private property. Except by displaying the picket signs, the Respondent's pickets did not communicate with any of the employees working at the construction projects.

The essential allegation of the complaint is that by picketing the construction projects, the Respondent induced employees of the neutral employers on the projects to cease work as a means of compelling such neutral employers to discontinue their business with Campbell, the primary Employer.

The Respondent defends its picketing of the construction projects on the ground that such picketing allegedly falls within the area of permissible conduct recognized by the Board in *Moore Dry Dock Company,* 92 NLRB 547 and *Stover Steel Service,* 108 NLRB No. 221. We find no merit in the Respondent's argument. Upon consideration of all relevant facts in the case, and for the reasons stated in *Washington Coca-Cola,* 107 NLRB No. 104, affirmed in *Thurston Motor Lines, Inc.,* 110 NLRB No. 122, we find that Respondent's picketing of the construction projects was conducted to force secondary employers located on such projects to cease doing business with Campbell, by inducing and encouraging the employees of said employers to engage in a strike in violation of Section 8(b)(4)(A) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III above, occurring in connection with the operations of Campbell Coal Company have a close, intimate and substantial relation to trade, traffic and commerce aong the several states and tend to burden and obstruct commerce and the free flow thereof.

V. The Remedy

Having found that the Respondent has violated Section 8(b)(4)(A) of the Act, we shall order it to cease and desist

therefrom and take certain affirmative action which is necessary to effectuate the policies of the Act.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, is a labor organization within the meaning of Section 2(5) of the Act.

2. By engaging in picketing with an object thereof to force or require George A. Fuller Construction Company, Southeastern Construction Company, The Flagler Company, Inc., Barge-Thompson Company, Ira H. Hardin Company, Wesley & Company, Inc., and Thompson and Street Company to cease doing business with Campbell Coal Company, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(A) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Order

Upon the entire record in the case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, AFL, and its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Inducing or encouraging employees of George A. Fuller Construction Company, Southeastern Construction Company, The Flagler Company, Inc., Barge-Thompson Company, Ira H. Hardin Company, Wesley & Company, Inc., and Thompson and Street Company, or of any other employer to engage in a strike or concerted refusal in the course of their employment to perform services for their employers where an object thereof is to force or require said employers to cease doing business with Campbell Coal Company.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at the business offices of Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, in Atlanta, Ga., copies of the notice attached hereto as Appendix A.[1] Copies of said notice, to be furnished by the Regional Director for the Tenth Region, after being duly signed by official representatives of the Respondent shall be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members of Local Union 859 are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material. The Respondent shall also

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[1] In the event that this Order is enforced by a Decree of the United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the united States Court of Appeals, Enforcing an Order."

sign copies of the notice which the Regional Director shall submit for posting, the employers willing, at the Atlanta, Ga., premises of the employers listed in Appendix B.

(b) Notify the Regional Director for the Tenth Region, in writing within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., December 30, 1954.

GUY FARMER, *Chairman,*
ABE MURDOCK, *Member,*
PHILIP RAY RODGERS, *Member,*
NATIONAL LABOR RELATIONS BOARD.

(SEAL)

APPENDIX A

NOTICE

To all members of Sales Drivers, Helpers & Building Construction Drivers, Local 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, and to all employees of Campbell Coal Company, pursuant to

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

We will not induce or encourage the employees of George A. Fuller Construction Company, Southeastern Construction Company, The Flagler Company, Inc., Barge-Thompson Company, Ira H. Hardin Company, Wesley & Company, Inc., and Thompson and Street Company, or any other employer, to engage in a strike or concerted refusal in the course of their employment to perform any services for their respective employer, where an object thereof is to force or require said Employers to cease doing business with Campbell Coal Company.

SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL.

Dated..... By.....
(Represenative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

George A. Fuller Construction Company
Southeastern Construction Company
The Flagler Company, Inc.
Barge-Thompson Company
Ira H. Hardin Company
Wesley & Company, Inc.
Thompson and Street Company

Stipulation

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D. C.

In the Matter of SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., GEORGIA BRANCH	Case No. 10-CC-79

It is hereby stipulated and agreed by and between Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL (herein called the Respondent), by and through its attorney, Edwin M. Pearce; Associated General Contractors of America, Inc., Georgia Branch (herein called A.G.C.), by and through its Executive Secretary, Robert H. Strickland; and Frank E. Hamilton, Jr., Counsel for the General Counsel of the National Labor Relations Board, that:

1.

Upon a charge filed by A.G.C. on the 28th day of June, 1954, and served on the Respondent on the 29th day of

June, 1954, receipt of which charge is hereby acknowledged by the Respondent, the General Counsel for the National Labor Relations Board on behalf of the National Labor Relations Board, herein called the Board, by the Regional Director for the Tenth Region, acting pursuant to authority granted in Section 10(b) of the National Labor Relations Act, 61 Stat. 136, herein called the Act, and pursuant to Section 102.15 of the Board's Rules and Regulations, issued a complaint and notice of hearing thereon, dated July 28, 1954, against the Respondent. True copies of the aforesaid charge, complaint and notice of hearing thereon were duly served by registered mail upon the Respondent and A.G.C.

2.

The Respondent, in its answer to the complaint herein and by this stipulation, admits the allegations of Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the aforesaid complaint.

3.

The Respondent concedes the jurisdiction of the Board over the subject matter of this case.

4.

Since on or about June 9, 1954, the Respondent has been on strike against Campbell Coal Company (herein called Campbell) and has continuously, at all times material herein, picketed Campbell's two ready-mix establishments in the Atlanta area. Such strike was called by the Respondent because of the discharge of a number of Campbell's ready-mix truck drivers. The Respondent contends that these drivers were discharged because of their membership in, and activity on behalf of, the Respondent.

5.

Campbell's truck drivers who operate the trucks by which Campbell delivers ready-mix to various contractors, enter and leave Campbell's ready-mix plants a number of times each working day. At the delivery point for the ready-mix the truck drivers, at the direction of the contractor on the job site, operate the unloading mechanisms of the ready-mix truck so as to place the ready-mix at points and in receptacles designated and provided by such contractor. A frequent method of unloading is to pour the mixture into forms which are so placed that when the mixture sets up the concrete becomes a part of the structure or project. The drivers spend approximately 25 per cent of their working time at the plant, approximately 25 per cent of their working time en route to and from the plant and approximately 50 per cent of their working time at the construction site.

6.

Since on or about June 9, 1954, when the Respondent struck Campbell's two ready-mix plants, some of Campbell's trucks have been followed by the Respondent's pickets from the struck ready-mix plants to various construction projects in the Atlanta area where Campbell's drivers were to make delivery of ready-mix to a Campbell customer. At the construction project the Respondent's picket would advise the contractor, or its representative, of the labor dispute with Campbell, and ask the contractor or his representative not to accept the ready-mix from Campbell. In many instances the delivery was then refused, and in those cases the Respondent took no further action. In instances where the contractor elected to accept delivery of ready-mix from Campbell, the Respondent picket that contractor's building project with banners reading:

"Employees of Campbell Coal Company on strike in protest of discharges against Union employees. Sales Drivers, Helpers and Building Construction Drivers, Local 859, AFL."

7.

The aforementioned picketing continued only so long as Campbell's trucks remained on the construction site, and was confined to the immediate area of the trucks, or as close thereto as the picket could get without trespassing on private property.

8.

In some instances some employees working on projects at which such picketing occurred, quit work for the duration of the picketing. The reason assigned by such employees for their refusal to work was the presence of the Respondent's picket sign. The Respondent's pickets did not inform the employees who quit work as aforesaid, or other employees working on the picketed projects, that such picketing was not intended as an appeal to them not to work, nor otherwise inform such employees that they were free to resume work while the picketing was in progress. Other than displaying the picket sign, the Respondent's pickets did not speak to or otherwise communicate with any of the employees working at the construction projects. Except by the display of picket signs, as herein described, the General Counsel does not contend that the Respondent, through its pickets, officers, or otherwise, in any manner threatened, coerced or intimidated employees to quit work, or that any other form of inducement or encouragement of employees, whether by way of union by-laws or rules (written or unwritten), threats, promises, or otherwise, existed.

9.

The contractors at whose construction projects the Respondent picketed as set out in Paragraphs 6, 7 and 8 above, and Paragraph 7 of the complaint herein, are those named in Paragraphs 3, 7 and 8 of the complaint herein.

10.

Because of a current general strike in the Atlanta area against employers in the building and construction industry, work on virtually all building projects in the area has halted. The strike referred to is general in the building trades and has no relation to the matters involved in this proceeding. Because of such work stoppage, the contractors are not ordering and Campbell is not presently delivering ready-mix to such construction projects. However, the Respondent contends that its conduct in picketing at the construction sites of Campbell's customers in the manner herein described, is in all respects legal and proper, and it contends that it has the right, should it so desire, to picket at the job site of any Campbell customer, in the same manner that the picketing was formerly conducted, when the strike in the construction industry is concluded and Campbell resumes making deliveries to such customers. The General Counsel contends that such picketing is violative of Section 8(b)(4)(A) of the Act, and the Respondent contends that it is not.

11.

This stipulation, together with the charge, affidavit of service of the charge, complaint, notice of hearing thereon, affidavit of service of complaint and notice of hearing thereon, and the Respondent's answer, shall constitute the entire record herein and shall be filed with the Board.

12.

The parties hereto expressly waive hearing, intermediate report of trial examiner, the filing of exceptions and oral argument before the Board, and all briefs in this matter will be submitted to the Board thirty (30) days from the date hereof.

13.

This stipulation is subject to the approval of the National Labor Relations Board. Upon the Board's approval of this stipulation and on receipt of the briefs provided for hereinabove, the Board may decide the case, make findings of fact and conclusions of law and issue an appropriate order as though after hearing, intermediate report, exceptions and oral argument before the Board.

14.

This stipulation contains the entire agreement of the parties, there being no agreement of any kind, verbal or otherwise, which varies, alters or adds to the stipulation.

IN WITNESS WHEREOF the undersigned hereunto set our hands on the dates and at the places written opposite our respective names.

SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL.

By EDWIN M. PEARCE,
Attorney.

Dated Aug. 31, 1954,
at Atlanta, Ga.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., GEORGIA BRANCH.

Dated Sept. 8, 1954, at Atlanta, Ga.

By ROBERT M. STRICKLAND,
Executive Secretary.

Dated Sept. 3, 1954, at Atlanta, Ga.

FRANK E. HAMILTON, JR.,
Counsel for the General Counsel,
National Labor Relations Board, Tenth Region, 528 Peachtree-Seventh Building, Atlanta, Ga.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL, *Petitioner* v. NATIONAL LABOR RELATIONS BOARD, *Respondent*	No. 12605

ON PETITION FOR REVIEW AND ON CROSS-PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD *

Decided December 8, 1955

Mr. Herbert S. Thatcher, with whom *Mr. Drexel A. Sprecher* was on the brief, for petitioner.

Mr. Norton J. Come. Attorney, National Labor Relations Board, of the bar of the Supreme Court of Illinois, *pro hac vice,* by special leave of Court, with whom *Mr. Marcel Mallet-Prevost,* Assistant General Counsel, National Labor Relations Board, was on the brief, for respondent.

* 10-CC-79; 110 NLRB 2192.

Before PRETTYMAN, BAZELON and FAHY, Circuit Judges.

FAHY, *Circuit Judge:* On findings of fact based upon a stipulation among the appellant Union, the General Counsel of the National Labor Relations Board, and the Associated General Contractors of America, Inc., Georgia Branch, the Board entered an order against the Union requiring it to cease and desist conduct found to violate section 8(b) (4) (A) of the Taft-Hartley Act, the so-called secondary boycott provision.[1] The Union petitions us to set aside the order and the Board petitions us to enforce it.

The case involves picketing at sites shared by the struck employer and neutral employers. The pertinent findings of fact contained in the Board's decision are in substance as follows: Campbell Coal Company is engaged in the sale of building materials including ready mixed concrete. It operates two ready-mix concrete plants in Atlanta, where it employs, among others, men who drive trucks by which Campbell delivers its ready-mix to construction sites. At the delivery points the truck drivers at the direction of the

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[1] This section provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. * * *" 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (4) (A) (1952).

contractors on those sites operate the unloading mechanism of the truck so as to place the ready-mix at places and in receptacles designated and provided by the contractors. Frequently the unloading is accomplished by pouring the mixture into forms so placed that when dry the mixture becomes part of the structure on the project. The drivers spend approximately 25 per cent of their working time at their employer's plants, 25 per cent en route, and 50 per cent at construction sites.

The Union initiated a strike against Campbell because of the discharge of a number of the truck drivers. It picketed the two ready-mix plants. In addition the pickets followed some of the trucks from the plants to various construction projects where the trucks made deliveries, although the Union had no dispute with any of the contractors on such projects. It is this latter picketing which the Board found to be illegal. The pickets carried signs which read as follows:

> "Employees of Campbell Coal Company on strike in protest of discharges against Union employees. Sales Drivers, Helpers and Building Construction Drivers, Local 859, AFL."

The picketing continued so long as Campbell's trucks remained on the construction site and was confined to the immediate area of the trucks or as close as the pickets could get without trespassing on private property. Except for displaying the picket signs. The Union's pickets did not communicate with any employees working at the projects.

On these findings [2] the Board reached the conclusion

[2] Some additional facts are contained in the stipulation but are not the subject of findings by the Board. No contention in this court is made by the Board upon the basis of these facts, although

that section 8(b) (4) (A) was violated because the picketing was conducted "to force secondary employers located on such [construction] projects to cease doing business with Campbell, by inducing and encouraging the employees of said employers to engage in a strike * * *"

In so ruling the Board said it relied upon the "reasons stated in *Washington Coca-Cola*, 107 NLRB No. 104 [p. 299], affirmed in *Thurston Motor Lines, Inc.*, 110 NLRB No. 122 [p. 748] * * *" It considered without merit the Union's defense that its picketing of the construction projects was within the area of permissible conduct recognized by the Board in *Moore Dry Dock Company*, 92 N.L.R.B. 547. In that case the Board laid down certain conditions which a union must meet in order for its picketing to be lawful where the site picketed is shared by the primary employer and neutral employers. These conditions are that the picketing disclose clearly that the dispute is with the primary employer only, that the picketing is

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some of them are enumerated in its brief. These are that at each construction site the Union agent advised the contractor or his representative of the dispute with Campbell and asked him not to accept delivery of the concrete. If delivery was refused the Union took no further action, but if accepted the Union agents picketed the immediate area of the trucks with the signs already described. The picketing continued while Campbell's trucks remained on the construction site. In some instances employees of the contractors working on the construction projects quit work for the duration of the picketing, assigning as the reason therefor the presence of the picket signs. The Union agents did not inform employees who quit or other employees on the projects that the picketing was not intended as an appeal to them not to work, but pickets did not speak to or communicates with any employees on the projects other than by displaying the picket signs, or in any manner threaten, coerce, or intimidate the employees to quit work or offer any other form of inducement or encouragement so to do.

limited to times when the dispute situs is on the neutral employer's premises, that the primary employer is engaged in its normal business at the common situs when the picketing takes place, and that the picketing is confined to areas reasonably close to the situs of the dispute. The Union here contends that it has met these conditions but that the Board has added another and absolute prerequisite that no situs for effective picketing other than the common one be available. While in *Moore Dry Dock* it was a fact that no such separate situs was available, the Board decision did not specify this as one of the conditions for lawful picketing at a common situs. We agree with the Union that in the case at bar the Board has added this condition and has applied a rigid rule that when another such separate situs is available picketing at a common situs is prohibited. This is borne out by the findings relied upon by the Board, above set forth, by its brief in support of its decision, and by the reasoning of the decision itself. As to the latter, the *Thurston* case is expressly relied upon. There the Board held that picketing at a common situs was unlawful "when the employer has a primary place of business in the locality which can be picketed by the labor organization with which the employer has a dispute." 110 N.L.R.B. at 754. Since there was such a separate situs it was concluded that the picketing at the situs which was common to the struck employer and the secondary employer was not primarly, but was "an attempt to induce and encourage the employees of various secondary employers to engage in a strike or a concerted refusal in the course of their employment to handle or work on Thurston's goods or perform services involving Thruston's goods, an object thereof being to require such secondary employers to cease doing business with Thurston." [3] *Ibid.*

[3] Although these statements are taken from the trial exam-

In *Washington Coca-Cola, supra,* decided before *Thurston,* and now also relied upon, the Board answered a union's contention that certain picketing was protected by the *Moore Dry Dock* rule by holding the rule inapplicable whenever the struck employer has a permanent place of business at which picketing can be effectively carried on.

Finally, we consider the Board's brief. It states:

> "Accordingly, the question is not * * * whether 'the dispute reaches to the area which is being picketed,' but whether Campbell, the primary employer, had separate premises in the area which provided the Union with a fixed and adequate base for carrying on its primary activity. The record shows that, like the company in *Coca-Cola, supra,* it did have such premises. * * * In these circumstances the Board's common situs rules are inapplicable, there being no excuse, other than the impermissible one of increasing the effectiveness of the picketing, for allowing the Union to extend it to the construction projects and thereby invoke neutral employers in its dispute with Campbell."

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iner's findings of fact, they must be regarded as proper expressions of the rule upon which the Board depends in the instant case. In the first place, the Board in *Thurston* adopted these findings. And in the second place, any other conclusion would rob of meaning the Board's reliance in the instant case upon "the reasons * * * affirmed in *Thurston Motor Lines, Inc.* * * *" since the Board gave no independent expression of reasons for the *Thurston* decision. It is true that the examiner assigned an alternative reason in *Thurston,* namely, that another *Moore Dry Dock* requirement was absent inasmuch as the picketing did not clearly disclose that the dispute was with the primary employer only. But the Board could not have intended to refer to this reason as applicable to the instant case, since here the picket signs were clear and there were no attempts by those picketing to induce employees of neutral employers not to cross the picket line, as there were in *Thurston.* Moreover, the Board's brief, discussed in the text *infra,* demonstrates beyond doubt that the rule relied upon is the one above outlined.

Affirmance by this Court of the *Coca-Cola* order, *sub nom. Brewery and Beverage Drivers and Workers Local Union No. 67* v. *NLRB*, —— U.S. App. D.C. ——, 220 F. 2d 380, did not constitute approval of the rule now advanced by the Board, but must be construed only as agreement with the conclusion the Board there reached, which rested in considerable part upon additional findings. Here, in contrast, the decision rests solely upon the fact that Campbell had other places of business, not common with a neutral employer, which could be and were being picketed.[4] Yet Campbell's employees worked at these places only about 25 per cent of their time and spent 50 per cent with the trucks at places where Campbell did business coincidently with neutral employers. Section 8(b) (4) (A) does not contain a provision which condemns concerted activity of employees with respect to their own employer merely because it occurs at a place where it comes to the attention of and incidentally affects employees of another, even where the activity could be carried on a a place where the primary employer alone does business. The existence of a common site, of such incidental effect, and of another place which can be picketed, are factors to be considered in determining whether or not the section has been violated, but alone are not conclusive.[5] The presence of these factors does not war-

[4] These were not the only factors considered by the Board in its decision recently upheld in *NLRB* v. *Associated Musicians of Greater New York, Local 802*, No. 23550, 2d Cir., Nov. 3, 1955. In that case requests were made by Union representatives that the secondary employers cease doing business with the primary employers. This was true in the present case, but was not relied upon by the Board. See note 2 *supra*. There are also other factual distinctions between the two cases.

[5] In addition to *Moore Dry Dock, supra*, see *Schultz Refrigerated Service*, 87 N.L.R.B. 502; *Oil Workers International Union (The Pure Oil Co.)*, 84 N.L.R.B. 315; *NLRB* v. *Service Trade Chauffeurs,*

rant a failure to consider other facts which are relevant and perhaps countervailing. See *NLRB* v. *General Drivers, Warehousemen and Helpers, Local 968,* 225 F. 2d at 209-210. No rigid rule which would make these few factors conclusive is contained in or deducible from the statute. To read it into the statute by implication would unduly invade the application of section 13[6] which preserves the right to strike, "except as specifically provided" in other provisions of the Act. It is not specifically provided that picketing at a common site, with an incidental effect upon employees of a neutral employer, is unlawful in every case where picketing could also be conducted against the primary employer at another of its places of business.

This view has been set forth at length in *NLRB* v. *General Drivers, Warehousemen and Helpers, Local 968,* 225 F. 2d 205 (5th Cir.). There the labor dispute involved four warehouse employees who occasionally made deliveries to construction sites where the remainder of the employer's work force was engaged. Employees of neutral employers were also working at these sites, but not at the primary employer's warehouse. Nevertheless, these common sites were picketed along with the warehouse, regardless of whether any of the four employees made deliveries to the construction projects. The picket signs together with pamphlets distributed by the pickets showed that the strike was against only the primary and no other employer, and that the picket line should be considered as directed only towards those locations within the projects where primary employees were working. The court held the Board erred

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191 F. 2d 65 (2d Cir.); *NLRB* v. *Local Union No. 55,* 218 F. 2d 226 (10th Cir.).

[6] 61 Stat. 151 (1947), 29 U.S.C. § 163 (1952).

in concluding that the Union was in violation of section 8(b) (4) (A) merely upon the basis of findings that "the drivers and warehousemen involved were employed 'not at the constructtion projects but at the Otis Massey [the primary employer's] warehouse,' so that the warehouse location was the sole 'situs of the Union's dispute,' and the place where it could 'adequately publicize' its private controversy with the primary employer without disrupting work of the *other* neutral employers." *Id.* at 208. Although such a finding as to situs, arrived at in part by applying the same "adequate publicity" rule here proposed, brought the case within the *Moore Dry Dock* criterion barring picketing at a common situs which is not the situs of the dispute, the court said that the approval which had been given by the courts to the standards set forth in *Moore Dry Dock* for lawful picketing at a common site.

> "* * * was necessarily based upon substantial evidence that the unlawful objective denounced by the statute actually existed, rather than upon the inferentially suggested theory that this ultimate and controlling statutory inquiry may be effectually supplanted merely by Board findings that the real 'situs' of a labor dispute exists at a location other than that determined by the conduct of the parties, at which place alone it may be 'adequately' publicized with impunity under the Act, and thereby inferring from such findings, as here, that the unlawful objective exists. Indeed, such a theory would, we think, elevate the Board formulated 'criteria' by judicial fiat to a vantage point from which it could, in effect, circumvent the statute, for in this type instance it would substitute Board inferences as to the lawfulness or unlawfulness of an objective, based purely on its own judgment as to the propriety and adequacy of the means employed in a labor dispute, for the sole statutory test of unlawfulness of the end or objective sought, contrary to the Supreme Court's pronouncements that it is ' "the objective of the union's secondary activities * * * and

not the quality of the means employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision." International Brotherhood of Electrical Workers Local 501, v. N.L.B.R., 341 U.S. 694, 704 * * *." 225 F. 2d at 209-210.

We agree with this analysis. In this case the Board does not even press the contention that the existence of a separate situs of the primary employer causes the *Moore Dry Dock* standards to bar picketing at a common situs. Rather it seems to assert that these standards need not be considered if effective picketing can be conducted at a situs not common. Nevertheless, this difference of approach and whatever factual differences exist between *Brewery and Beverage Drivers* and this case do not render the Fifth Circuit's reasoning any less pertinent. A violation of section 8(b) (4) (A) is not to be found by a rule of decision based upon findings which are inadequate to support the conclusion reached.

Since the decision of the Board, as shown by its findings and reasoning, turns upon the fact of concerted activity at a common situs where one not common was available, we will set aside the order, nothwithstanding the picketing had incidental effect upon employees of neutral employers, but will remand the case to the Board for its further consideration, if desired. Otherwise our decision would constitute an approval of a rigid rule which the language of the statute does not support.

It is so ordered.

116 NLRB No. 124

D-35
Atlanta, Ga.

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS LOCAL UNION 859 OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO (Campbell Coal Company) and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., GEORGIA BRANCH	Case No. 10-CC-79

SUPPLEMENTAL DECISION AND ORDER

On December 30, 1954, the Board issued a Decision and Order in this case.[1] It found that the Respondent had violated Section 8(b) (4) (A) of the Act by picketing the work places of certain secondary employers to induce or encourage employees of said employers to engage in a strike with an object thereof to force employers to cease doing business with Campbell Coal Company. To remedy the violation found the Board ordered the Respondent to cease and desist from the conduct found to be unlawful and to take certain affirmative action.

[1] 110 NLRB 2192

In its Decision the Board rejected the Respondent's contention that its picketing of work places occupied by secondary employers fell within the area of permissible conduct recognized by the Board in *Moore Dry Dock Company,* 92 NLRB 547, and *Stover Steel Service,* 108 NLRB 1575. In rejecting this contention and in finding the violation the Board applied its reasoning, as expressed in *Washington Coca-Cola Bottling Company,* 107 NLRB 299, that picketing at a common situs occupied by both the primary employer and secondary employers is unlawful where the employer, as in the instant case, has a place of business in the locality occupied by it alone which can be adequately picketed.

The case was considered by the United States Court of Appeals for the District of Columbia [2] upon the Respondent's petition for review and for the Board's cross-petition for enforcement of its Order. The Court issued its opinion on December 8, 1955, setting aside the Board's Order and remanding "the case to the Board for its further consideration, if desired." In its opinion the Court disagreed with the Board's application of the *Washington Coca Cola* rationale and stated that the "existence of a common situs, of such incidental effect, and of another place which can be picketed are factors to be considered in determining whether or not the Section [Section 8 (b) (4) (A)] has been violated, but alone are not conslusive."

The Court set aside the Order of the Board solely on the ground that the Board's decision "turns upon the fact of concerted activity at a common situs where one not common is available." This the Court believed to be a rigid rule which it would be approving were it to enforce the Board's Order. In its decision, however, the Court recog-

[2] 229 F. 2d 514, Cert. denied 351, U. S. 972.

nized that there was additional evidence in this record to support a finding that the Respondent Union had violated Section 8(b) (4) (A). Such evidence was not relied upon by the Board and was therefore not considered by the Court in the enforcement proceeding. In view of the Court's decision, the Board has carefully reconsidered the entire record in this case to determine upon all the evidence whether the picketing activities of the Respondent are in violation of the Act.

As heretofore found, the Campbell Coal Company operated two ready-mix concrete plants in the Atlanta, Georgia, area and employed truckdrivers for the purpose of transporting the ready-mix to various construction projects in that area. The truckdrivers entered and left the ready-mix plants several times during the course of each day, spending approximately 25 percent of their working time at the plants, 25 percent en route and 50 percent at the construction sites. At the construction sites the truckdrivers operate the loading mechanisms of the trucks so as to deposit the ready-mix at places and in receptables designated and provided by the contractors. A frequent method of unloading is to pour the mixture into forms so placed that the mixture, when dried, becomes a part of the structure of the project.

In June 1954 the Union called a strike against Campbell and picketed its two ready-mix plants. In addition the pickets followed Campbell's trucks to the construction projects where they made deliveries. The pickets carried signs reading:

> Employees of Campbell Coal Company on strike in protest of discharge against Union employees. Sales Drivers, Helpers & Building Construction Drivers, Local 859, AFL-CIO.

The picketing continued only so long as Campbell trucks remained at the construction projects and was confined to the immediate area of the trucks. Except by displaying the picket signs, the pickets did not communicate with any of the employees at the project. At each construction site the Respondent's agent advised the contractor or his representative of the dispute with Campbell and asked him not to accept delivery of the concrete. If delivery was refused the Respondent took no further action, but if accepted the Respondent's agents picketed the trucks as described above. Further, in some instances employees of the neutral contractors refused to work for the duration of the picketing, assigning as their reason the presence of the picket signs. The Respondent's agents made no effort to inform these employees that the picketing was not intended as an appeal to them not to work.

The Respondent contends that its picketing was limited to the employees of Campbell Coal and was not intended to induce a concerted refusal to work by employees of the neutral contractors. The Respondent's position is, in our opinion, directly refuted by the evidence set forth above. Unable to cause a cessation of business between certain neutral contractors and the primary employer by direct appeals to the former, the Respondent sought to accomplish that objective through a picket line appeal to employees of the secondary employers. Only those employers who refused to accede to the Respondent's demands that they cease doing busines with Campbell Coal were picketed. When employees of these employers ceased working as a direct result of the picketing the picket line had accomplished the Respondent's previously revealed objective of putting pressure on neutral employers to force them to cease doing business with the primary employer. No attempt was made by the Respondent to inform striking employees that the

picket line was aimed at Campbell Coal and not at the employees of neutral contractors. As the Court of Appeals for the District of Columbia indicated in its decision, evidence of this nature has been held sufficient to establish the unlawful object of picketing under Section 8 (b) (4). *N.L.R.B.* v. *Associated Musicians of Greater New York, Local 802*, 226 F. 2d 900 (C. A. 2).

A consideration of all these elements in the record, including, but not limited to, the fact that the Respondent could have effectively picketed Campbell Coal at its own business premises in the area, persuades us that the Respondent had violated Section 8 (b) (4) within the meaning of the decision of the Court of Appeals for the District of Columbia, remanding the case to the Board for further consideration, if desired.

Accordingly, upon the basis of this Supplemental Decision the National Labor Relations Board hereby respectfully requests the United States Court of Appeals for the District of Columbia to enforce the following Order.

ORDER

Upon the entire record in the case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, and its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Inducing or encouraging employees of George A. Fuller Construction Company, Southeastern Construction Company, The Flagler Company, Inc., Barge-Thompson

Company, Ira H. Hardin Company, Wesley & Company, Inc., and Thompson and Street Company, or of any other employer to engage in a strike or concerted refusal in the course of their employment to perfom services for their employers where an object thereof is to force or require said employers to cease doing business with Campbell Coal Company.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at the business offices of Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, in Atlanta, Georgia, copies of the notice attached hereto as Appendix A.[3] Copies of said notice, to be furnished by the Regional Director for the Tenth Region, after being duly signed by official representatives of the Respondent shall be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members of Local Union 859 are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material. The Respondent shall also sign copies of the notice which the Regional Director shall submit for posting, the employers willing, at the Atlanta, Georgia, premises of the employers listed in Appendix B.

[3] In the event that this Order is enforced by a Decree of the United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

(b) Notify the Regional Director for the Tenth Region, in writing within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated Sept. 7, 1956, Washington, D. C.,

BOYD LEEDOM, *Chairman*
ABE MURDOCK, *Member*
PHILIP RAY ROGERS, *Member*
STEPHEN S. BEAN, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX A

NOTICE

To All Members of Sales Drivers, Helpers & Building Construction Drivers, Local 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, and to all Employees of Campell Coal Company

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

WE WILL NOT induce or encourage the employees of GEORGE A. FULLER CONSTRUCTION COMPANY, SOUTHEASTERN CONSTRUCTION COMPANY, THE FLAGLER COMPANY, INC., BARGE-THOMPSON COMPANY, IRA H. HARDIN COMPANY, WESLEY & COMPANY, INC., AND THOMPSON AND STREET COMPANY, or any other employer, to engage in a strike or concerted refusal in the course of their employment to perform any services for their respective employer, where an object thereof is to force or require said Employers to cease doing business with Campbell Coal Company.

APPENDIX A

SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, & HELPERS OF AMERICA, AFL.

Dated ..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

George A. Fuller Construction Company
Southeastern Construction Company
The Flagler Company, Inc.
Barge-Thompson Company
Ira H. Hardin Company
Wesley & Company, Inc.
Thompson and Street Company

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UION 859, OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO (Campbell Coal Company) and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., GEORGIA BRANCH	Case No. 10-CC-79

ORDER GRANTING MOTION

On September 7, 1956, the Board issued a Supplemental Decision and Order[1] in the above-entitled proceeding. Thereafter, on October 31, 1956, counsel for the General Counsel filed a Motion to Amend Supplemental Decision and Order by naming Truck Drivers and Helpers Local Union No. 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO as the Respondent in lieu of Sales Drivers, Helpers & Building Construction Drivers Local Union 859 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO. Attached to the said motion was a Stipulation of the parties agreeing to such amendment. The Board having duly considered the matter,

[1] 116 NLRB No. 124

Order Granting Motion

IT IS HEREBY ORDERED that the Motion to Amend Supplemental Decision and Order be, and it hereby is, granted.

Dated, Washington, D. C., November 15, 1956.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary.

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUCK DRIVERS AND HELPERS, LOCAL UNION 728 (formerly Local Union 859) OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO *Petitioner,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 13,651

PREHEARING CONFERENCE STIPULATION

Pursuant to Rule 38(k) of the Rules of this Court, the parties, subject to the approval of the Court, do hereby stipulate and agree as follows with respect to the issues, the dates for the filing of the briefs and joint appendix, and the contents of the joint appendix:

I. STATEMENT OF THE ISSUE

Whether the Board properly concluded that, in the circumstances of this case, the union's picketing at various construction projects violated Section 8(b)(4)(A) of the National Labor Relations Act.

II. THE CONTENTS OF THE RECORD AND THE JOINT APPENDIX

1. The record in No. 12,605, *Sales Drivers, Helpers and Building Construction Drivers, Local Union 859* v. *N.L.R.B.*

(C.A.D.C.), shall be incorporated into and made a part of the record in the instant proceeding.

2. The portions of the record to be printed as a joint appendix shall consist of:

(a) The decision and order of the Board in *Sales Drivers, etc. and Associated General Contractors of America, Inc., Georgia Branch,* Case No. 10-CC-79, dated December 30, 1954.

(b) The stipulation in Case No. 10-CC-79 entered into about September 9, 1954, between the union, the charging party, and counsel for the General Counsel of the Board.

(c) The opinion of the Court of Appeals for the District of Columbia Circuit in No. 12,605, *Sales Drivers, Helpers and Building Construction Drivers Local Union 859* v. *N.L.R.B.*, dated December 8, 1955.

(d) The supplemental decision and order of the Board in *Sales Drivers, Helpers and Building Construction Drivers, Local Union 859, et al.*, Case No. 10-CC-79, dated September 7, 1956.

(e) Order of the Board in Case No. 10-CC-79 granting motion to amend supplemental decision and order, dated November 15, 1956.

III. Dates for filing of briefs and Joint Appendix

Petitioner's opening briet and the joint appendix shall be filed on or before March 29, 1957.

Respondent's brief shall be filed on or before April 30, 1957.

Petitioner's reply brief, if any, shall be filed on or before May 20, 1957.

Dated at Washington, D. C. this 25th day of February, 1957.

HERBERT S. THATCHER,
Counsel for Petitioner.
Counsel for Respondent

STEPHEN LEONARD,
Associate General Counsel
National Labor Relations Board

United States Court of Appeals
For the District of Columbia Circuit

JANUARY TERM, 1957.

TRUCK DRIVERS AND HELPERS LOCAL UNION 728 (FORMERLY LOCAL UNION 859) OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO, *Petitioner,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 13,651

FILED, MAR. 1, 1957

JOSEPH W. STEWART, *Clerk.*
Before: Burger, Circuit Judge.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation dated February 25, 1957, and the stipulation having been considered, the stipulation of the parties is hereby approved, and it is

ORDERED that the parties proceed according to the stipulation and that this order and the stipulation dated February 25, 1957, be printed in the joint appendix.

Dated: March 1, 1957.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 23 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 736

TRUCK DRIVERS AND HELPERS LOCAL UNION 728 (formerly Local Union 859) OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

HERBERT S. THATCHER,
1009 Tower Building,
Washington 5, D. C.

DAVID PREVIANT,
511 Warner Building,
Milwaukee 3, Wisconsin

EDWIN PEARCE,
Candler Building,
Atlanta 3, Georgia
Counsel for Petitioner

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IN THE

Supreme Court of the United States

October Term, 1957

No.

TRUCK DRIVERS AND HELPERS LOCAL UNION 728 (formerly Local Union 859) OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled case on October 28, 1957. Such judgment affirmed a decree of the National Labor Relations Board directing petitioner to cease and desist from certain picketing which was alleged to be in violation of Section 8(b) (4) (A) of the National Labor Realtions Act, as amended.

OPINION BELOW

The Opinion of the Court of Appeals is not yet reported and is attached hereto as Appendix "A". See also R. 44.

JURISDICTION

The judgment of the Court of Appeals was entered on October 28, 1957. R. 50.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

QUESTION PRESENTED

Whether, in view of the special protection afforded the right to picket under Section 13 of the Act as well as under the Federal Constitution, otherwise lawful picketing of a primary employer at a site of primary employment but which site is shared by neutral employers, can be declared illegal under Section 8(b) (4) (A) as being carried on for a "secondary" object of involving such neutrals merely on the basis of Board inference of a general illegal object derived solely (a) from the incidental effects of such picketing on neutrals at the common situs and the availability of another situs for picketing where no neutrals are present, (b) from attempts by the Union to solicit the voluntary support of such neutrals, and (c) from the failure of the Union affirmatively to inform the neutrals' employees that the picketing was not directed against them; that is, can picketing at a common but primary situs of employment be declared illegal under Section 8(b) (4) (A) in the absence of clear and convincing evidence that it was an *actual* object of such picketing to involve the neutrals there located?

STATUTES INVOLVED

The pertinent provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. § 151, *et seq.*), are §§ 7, 8(b) (4) (A) and 13:

> "Sec. 7. Employees shall have the right to self-organizations, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage

in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3)."

"Sec. 8 . . . (b). It shall be an unfair labor practice for a labor orgainzation or its agents—. . . .

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . . ."

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

STATEMENT

A. The Facts

The facts upon which the Board based its conclusions in both its original and Supplemental Decision are confined entirely to a short stipulation (R. 11a) agreed to by the parties in the original proceedings before the Board. These facts are as follows:

In June of 1954 the Union became involved in a labor dispute with the Campbell Coal Company hereinafter sometimes referred to as "Campbell" or the

"Employer") of Atlanta, Georgia. That company operates two ready-mix concrete plants in the Atlanta area. Following the discriminatory discharge of nine of its members by Campbell, the Union engaged in a strike commencing June 9, 1954. In connection with its ready-mix operations Campbell employs truck drivers who deliver the ready-mix to various construction sites in that area. These truck drivers enter and leave the two ready-mix plants several times in the course of each working day, although they spend only approximately 25% of their time at these plants. Approximately 25% of the truck drivers' time is spent going to and from the plants and the construction sites. The balance of the working time of these truck drivers is spent at the construction sites. There Campbell's truck drivers, at the direction of the contractors on the job sites, operates the unloading mechanisms of the trucks so as to place and pour the ready-mix concrete as directed by the contractors. The ready-mix concrete becomes a part of the structures being built at the construction projects.

The Union picketed at both of the plants and also at seven construction sites where the ready-mix concrete was being delivered and poured. The picketing at the construction sites was peacefully conducted by pickets who carried signs which read:

"Employees of Campbell Coal Company on strikes in protest of discharges against Union employees. Sales Drivers Helpers & Building Construction Drivers, Local 859, AFL."

The pickets conducted their picketing only when the Campbell trucks were engaged in pouring concrete and picketed as closely as possible to the trucks. No oral or other inducement was made to any other employees at the construction site to refrain from working.

At each construction site the Union agent advised the contractor of the dispute with Campbell and asked him not to accept delivery of the concrete. If delivery was refused, the Union took no further action, but if accepted the Union agents picketed the immediate area of the trucks with the signs as described above. While the Union made no attempt to induce the employees of the neutrals to refrain from working other than by display of the picket signs, neither did it take any affirmative steps to inform the employees of such neutrals that the picketing was not aimed at their employer.

B. The Proceedings Below

The Board considered the case twice and issued an original Decision (R. 1a) and a Supplemental Decision (R. 28a) in both of which it found that the picketing was proscribed by Section 8(b) (4) (A) of the Act. In its first decision the Board did not rely on the facts set forth in the paragraph immediately above, but inferred an illegal object of involving the neutrals merely from the fact that the picketing could have been effectively carried on at Campbell's own premises where there were no neutral employers engaged in work. (110 NLRB No. 274.) On Petition to Review to the court below, that court reversed on the ground that the Board was not warranted in inferring an illegal object from the mere fact of ability to picket other than at the common situs,[1] and remanded the case to

[1] As stated by that court (229 F. 2d at 517 (R. 25a):

"To read [a rigid rule of no common situs picketing where another situs is available] into the statute by implication would unduly invade the application of Section 13 which preserves the right to strike 'except as specifically provided' in other provisions of the Act. It is not specifically provided that picketing at a common site, with an incidental effect upon employees of a neutral employer, is unlawful in every case where picketing could also be conducted against the primary employer at another of its places of business."

the Board so that, if it desired, the Board could consider all portions of the evidence (229 F. 2d 514, cert. denied 351 U.S. 972) (R. 18a).

Following such remand, the Board issued a Supplemental Decision in which, relying on the additional evidence it had previously considered inconsequential, namely, that the union had requested the neutrals employers' voluntary support and had failed affirmatively to inform the neutrals' employees that the picketing was not aimed at their employer, concluded that it was an object of the picketing to induce the employees of the contractors or subcontractors at the construction site to cease employment for the purpose of forcing those contractors to cease using Campbell's ready-mix concrete (116 NLRB 1020) (R. 28a).

C. The Decision of the Court Below

Following appeal of the Board's Supplemental Decision to the court below, that court, in a split 2-1 decision, affirmed the Board. Although it found that the union was "within its right in appealing directly to neutral employers not to accept delivery from the primary employer", and that it was under no legal duty to inform the neutral's employees that the picketing was not aimed at their employer, nevertheless the majority held that these were factors from which the Board could draw an inference of an illegal object, protections accorded primary picketing in Section 13 of the Act notwithstanding. The Court stated:

> "[T]he Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight." . . .
> "We recognize the doubt, but we must give weight to the resolution of it by the Board."
> (R. 47.)

Judge Bazelon, dissenting, held the inference of illegality of the picketing to be without support, being

derived solely from otherwise lawful conduct Since the picketing was otherwise primary and lawful, it was his opinion that the Board had seriously "impaired" the Act's basic policy of not interfering with the right to strike or picket. (R. 49).

REASONS FOR GRANTING THE WRIT

1. The question presented is of major importance in the administration of the National Labor Relations Act, in particular with respect to the application of Section 8(b) (4) (A) of that Act to the common situs picketing situation, and in respect to the manner in which that section can be used to avoid the special protections which Congress has accorded the right to picket under Section 13. If the Board is to be permitted to interpret and apply the proscriptions against alleged secondary picketing in the manner in which it has done in the present case, and if it is to be permitted to utilize bare inference or speculation derived from lawful union activities to outlaw otherwise lawful picketing at a primary place of employment, then there can be no lawful picketing at a primary place of employment where neutral employers happen to be engaged in work along with the picketed primary employer, for in such a situation there are invariably a number of factors present, such as here, from which the Board could easily infer an unlawful object. Nowhere in the Act is any distinction made between picketing of a primary employer carried on at its own place of business or such picketing carried on at a common situs of employment where the employer, as here, is engaged in his ordinary operations for the major portion of the working day; and examination of the Act's legislative history reveals no Congressional purpose to make any such distinctions. Both the legislative history of the Act and its express language indicate no intent to obstruct the traditional

and constitutionally-protected right of a union to picket a primary employer pursuant to a legitimate primary labor dispute, and this regardless of the place where the picketing is carried on and regardless of such factors as the adequacy or effectiveness of the picketing or its incidental effect on others. Indeed, and on the contrary, by Section 13 of the Act "Congress has made it clear that § 8(b) (4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is 'specially provided for' in the Act." (*N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665.)[2]

It is to be noted that the employees of the primary employer herein (Campbell Coal) were not only engaged in their customary work at the construction sites for the major portion of their working day, but were also integrally involved in the construction operations, so that their primary place of employment, as well as the primary situs of their labor dispute, was at the construction site rather than at the place where they drove their trucks to pick up the ready-mix concrete. Thus, the picketing here was carried on at the primary place of employment and against the primary employer.

Because of the particular protection given the right to picket in a primary dispute under Section 13 of the Act, and in view of the preferred status of that right

[2] Although the reference in the decision is to "the ordinary strike", the Supreme Court obviously equated ordinary picketing with the ordinary strike, because, in *Rice Milling* none of the employees of the employer against whom the picketing was directed engaged in the strike or in the picketing and, indeed, none were members of or sympathetic to the Union. The "strike" actually was picketing for recognition and consisted solely of picketing by members of the Union who were not employees of the struck employer.

under the Federal Constitution[3] it would appear that the Board has no warrant to rely on mere inference or supposition to conclude that otherwise legitimate picketing is illegal but, rather, must be obliged to arrive at a conclusion of unlawful object only on the basis of concrete proof or clear and convincing evidence. Here, the Board has resorted to coupling two separate activities of the Union, each of them legal in itself, to produce an alleged illegal purpose. Since the picketing of a primary employer at a common site of employment is proper under the Act even though that employer might have been picketed elsewhere, and since direct appeal for the cooperation of neutral employers is permitted under the Act,[4] it is difficult to see how the combination of two legitimate activities can support a finding of unlawful object. In another context this Court has similarly condemned "the practice of imputing a sinister meaning to the exercise of a person's constitutional rights." *(Slochower v. Board of Ed. of N.Y.*, 100 L. Ed. (Adv.) 449, 454.) To paraphrase the language in that case, the constitutional right to engage in peaceful picketing and the Congressionally-protected right to solicit the aid of neutral employers "would be reduced to a hollow mockery if [their] exercise could be taken as equivalent . . . to a confession of" an unlawful purpose.

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[3] *Thomas v. Collins*, 323 U.S. 516, at 529; *Burstyn v. Wilson*, 343 U.S. 495, at 503; *Murdock v. Pennsylvania*, 319 U.S. at 115; *American Communications Asso. v. Douds*, 339 U.S. 382, at 401.

[4] The fact, relied on by the Board and the majority of the court below, that the picketing at the construction site was carried on only when the neutral employers refused the union's requested support proves nothing and can afford no basis for an adverse inference for the reason that, obviously, the picketing of Campbell at the construction site could be carried on only if Campbell appeared at the construction site to deliver concrete which had been accepted; in those instances where the contractor voluntarily refused to deal with Campbell, there would be no occasion for the Campbell trucks to appear at the construction site, and hence there would be no occasion or opportunity to picket.

From the above discussion, it is respectfully submitted that this case involves important questions concerning the degree and quality of proof required under Section 8(b) (4) to destroy the protections accorded primary picketing under Section 13 of the Act and under the Federal Constitution. In an effort to impose restrictions on primary picketing, carried on at a common situs of employment, which restrictions are neither contained in the Act not intended by Congress, the Board, in this and other cases, has substituted conjecture and supposition for the concrete proof of an actual illegal object, which, it is submitted, is necessary to overcome the picketing protections of Section 13.

2. The holding of the court below that the Board can be permitted to infer from otherwise lawful conduct a general "object" on the part of the Union to induce work stoppages of neutral employees as proscribed under Section 8(b) (4) (A), rather than the necessity of relying on clear and convincing evidence that it was an *actual* "object" of the union to involve neutrals in the primary dispute, is in conflict with the holding of the Fifth Circuit in the *Otis-Massey* case *(National Labor Relations Board v. Teamsters Local* 968 (C.A. 5), 225 F. 2d 205, cert. denied 350 U.S. 914; and of the Second Circuit in *Douds v. Internationl Longshoremen's Ass'n.,* 224 F. 2d 455, cert. den. 76 S. Ct. 117). In those cases, which like the present one involved a question of the application of Section 8(b) (4) (A) to so-called common situs picketing, both Circuits stressed the necessity for finding upon some substantial evidence other than inference that "the unlawful objective denounced by the statute *actually* existed." (225 F. 2d at 209.) Indeed, in the *Douds* case in the Second Circuit, Judge Learned Hand, speaking for the Court, was explicit in reminding that the probable or even inevitable consequence of involv-

ing a neutral because of certain otherwise legitimate activities might not be enough to warrant an inference of an unlawful object: "When Congress limited the wrong to occasions when the cessation was an 'object' of the conduct, it excluded much indeed that the ordinary law of tort would have included. If it had not done so, it would have made nearly all strikes unlawful. The 'object' of an action is the concluding state of things that the actor seeks to bring about; that which satisfies his aim." (224 F. 2d at 459.) Also compare *Sales Drivers, Helpers & Building Construction Drivers Local Union 859, etc. v. N.L.R.B.*, 229 F. 2d 514, 97 U.S. App. D.C. 173, cert. denied, 351 U.S. 972, with *N.L.R.B. v. United Steel Workers* (C.A. 1), No. 5237, December 5, 1957, 41 LRRM 2181. These cases are in direct conflict respecting the essential issue in this case.

3. The holding of the court below in sustaining the Board's conclusions of illegality on the undisputed record in this case is erroneous. This follows not only from what has been set forth above, but from the fact that "The burden 'was upon the Board to prove its charges by competent and credible evidence and not upon the Respondent to disprove them'." (Quoted in *N.L.R.B. v. Reynolds & Manley Lumber Co.*, 212 F. 2d 155, 158 (C.A. 5, 1954.) In addition, it is to be remembered that "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice." *(Houston Chronicle Publishing Co.*, 211 F. 2d 848 (C.A. 5).)

It is respectfully submitted that, in view of the special protections accorded the right to picket under Section 13 of the Act and the Federation Constitution, it cannot be said in this case that the Board's conclusions that the picketing was for an object proscribed by Section 8(b)(4)(A) of the Act, is supported by sub-

stantial evidence on the record considered as a whole *(c.f. Universal Camera Corp. v. N.L.R.B.,* 304 U.S. 374), but rather is based solely on speculation, conjecture or other inference insufficient to justify proscription of otherwise proper primary picketing.

The foregoing considerations, coupled with the paramount consideration that the right of picketing, both under the First Amendment and specifically under Section 13 of the Act, has acquired a special degree of protection, would seem to require a modification of the Board's current practice of inferring an unlawful objective in otherwise proper primary picketing solely on the basis of the incident of a common situs and of the carrying on of legitimate activities, such as soliciting a neutral's voluntary support. If the Board is permitted to indulge in such inferences, then the way is easy for abrogation of all common situs picketing, no matter how primary or otherswise legitimate such picketing may be.

CONCLUSION

It is respectfully submitted that, for the reasons asserted above, this Petition for a Writ of Certiorari should be granted.

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13651

TRUCK DRIVERS AND HELPERS LOCAL UNION 728 (formerly Local Union 859) OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition to Review and on Petition for Enforcement of an Order of the National Labor Relations Board

---

Decided October 28, 1957

Mr. Herbert S. Thatcher for petitioner.

Mr. Norton J. Come, Attorney, National Labor Relations Board, with whom *Messrs. Stephen Leonard,* Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost,* Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Before PRETTYMAN, BAZELON and FAHY, *Circuit Judges.*

FAHY, *Circuit Judge:* This is a sequel to *Sales Drivers* v. *NLRB,* 97 U.S. App. D.C. 173, 229 F.2d 514.

There we set aside an order of the Board resulting from its decision that the Union had violated section 8(b)(4)(A) of the Taft-Hartley Act.[1] This is the so-called secondary boycott provision.[2] We remanded the case to the Board for its further consideration, if desired. The Board gave further consideration and issued a Supplemental Decision and Order.[3] The Union now petitions us to set aside this order and the Board requests that we enforce it.

Both decisions were reached by the Board on the basis of facts set forth in the same stipulation. But in its previous decision the Board disregarded some of those facts; that is, it held that the picketing constituted a secondary boycott upon consideration of only part of the facts, namely, (1) that the picketing occurred at sites shared by the struck employer, the Campbell Coal Company, and neutral employers, to which sites the pickets followed trucks of the primary employer from its plants to construction jobs of neutral employers where deliveries were made to the latter, with whom the Union had no dispute, and (2) although the picketing at these construction projects did not go beyond the standards of conduct which preserved the validity of the picketing in *Moore Dry Dock,* 92 N.L.R.B. 547, there was available to the Union in the present case, though not in *Moore Dry Dock,* the opportunity to picket plants of the primary employer which were not common to sites of secondary employ-

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[1] 49 Stat. 452 (1935), as amended 29 U.S.C. § 158(b)(4)(A) (1952).

[2] While § 8(b)(4) does not expressly mention "primary" or "secondary" disputes, strikes, or boycotts, it is often referred to in the Act's legislative history as one of the Act's "secondary boycott sections." The other is § 303, 61 Stat. 158 (1947), 29 U.S.C. § 187 (1952). See *NLRB* v. *Denver Bldg. Council,* 341 U.S. 675, 686; *NLRB* v. *International Rice Milling Co.,* 341 U.S. 663, 673 n. 8. An interesting review of the subject is found in 45 Georgetown L.J. 614 (1957).

[3] 116 N.L.R.B. 1020.

ers. Due to this added fact the Board held the conduct invalid, relying upon *Washington Coca-Cola,* 107 N.L.R.B. 299. We set aside the Board's order, however, on the ground that this single factor added to those present in *Moore Dry Dock* was insufficient to make out a violation of section 8(b)(4)(A) which otherwise did not exist.[4]

On the remand the Board has relied upon circumstances included in the stipulation of facts which it did not rely upon in its first decision. These are: At each construction site of a neutral employer the Union's agent advised such employer or his representative of the dispute with the primary employer and asked the neutral employer not to accept delivery from the primary employer. If delivery were refused the Union took no further action but if accepted the Union agents picketed the trucks of the primary employer while they were at the site which was common to that of the secondary or neutral employer. In some instances employees of the neutral employer refused to work during the picketing, assigning as their reason the presence of the picket signs, and the Union's agents made no effort to inform these employees that the picketing was not intended as an appeal to them not to work.

The Union contends that its picketing was limited to employees of the primary employer and was not intended to induce concerted refusal to work by employees of neutral employers. In its supplemental decision the Board, pointing to the facts above set forth, answers that the Union,

> Unable to cause a cessation of business between certain neutral contractors and the primary employer by direct appeals to the former . . . sought

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[4] "No rigid rule which would make these few factors conclusive is contained in or deducible from the statute." 97 U.S. App. D.C. at 176, 229 F.2d at 517.

> to accomplish that objective through a picket line appeal to employees of the secondary employers. Only those employers who refused to accede to the Respondent's [Union's] demands that they cease doing business with Campbell Coal were picketed.

The Board continues:

> When employees of these employers ceased working as a direct result of the picketing the picket line had accomplished the Respondent's previously revealed objective of putting pressure on neutral employers to force them to cease doing business with the primary employer. No attempt was made by the Respondent to inform striking employees that the picket line was aimed at Campbell Coal and not at the employees of neutral contractors.[5]

"[T]he Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight." *NLRB* v. *Denver Bldg. Council, supra* at 692.

We recognize the doubt, but we must give weight to the resolution of it by the Board. So doing we should refrain on the facts of this case from repudiating the judgment of the Board that an object of the picketing, though not necessarily the sole object, see *NLRB* v. *Denver Bldg. Council, supra* at 689, was within the proscription of section 8(b)(4)(A). Though the Union was within its rights in appealing directly to neutral employers not to accept deliveries from the primary employer, when picketing followed noncompliance with the Union's appeal the combination of circumstances could be considered by the Board in determining that an object of the picketing came within the object condemned by the secondary boycott section of the statute. The same can be said of the failure of the Union to inform striking employees of neutral employers that the picket line was not aimed at those employ-

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[5] 116 N.L.R.B. at 1022.

ers; that, too, was a factor the Board could consider, as it did.

The Union contends that the Board's decision is in derogation of section 13 which provides that nothing in the statute, "except as specifically provided therein, shall be construed to interfere with or impede in any way the right to strike."[6] But section 8(b)(4)(A) is a specific provision and if it is violated section 13 is of no help. Cf. *NLRB* v. *International Rice Milling Co., supra* at 673. While the right to strike must be upheld unless the evidence fairly brings a case within some limitation upon that right, we cannot say that the evidence did not warrant the Board in finding that the conduct as a whole was within the limitation contained in section 8(b) (4) (A).

We have considered also the Union's reliance upon the well established principle that peaceful picketing is an exercise of freedom of expression, guaranteed by the First Amendment. *Carlson* v. *California,* 310 U.S. 106; *Thornhill* v. *Alabama,* 310 U.S. 88. The Union urges that this principle must be vindicated unless the situation clearly warrants the contrary. But the Supreme Court has held that section 8(b)(4)(A) is not an abridgement of the First Amendment. *International Brotherhood of Electrical Workers* v. *NLRB,* 341 U.S. 694, 705; cf. *Carpenters Union* v. *Ritter's Cafe,* 315 U.S. 722. And, as we have already indicated, the facts do not warrant us in repudiating the Board's finding that that section was violate.

Affirmed.

BAZELON, *Circuit Judge,* dissenting: The Union agent requested the neutral employer not to accept de-

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[6] 49 Stat. 457 (1935), 29 U.S.C. § 163 (1952).

liveries from the primary employer. Nothing transpired which could be construed as a threat or pressure. Upon refusal of the request, the Union picketed the site of the neutral employer as it had done in similar cases of refusal. It is clear that the Union was within its rights in making its request of the neutral employer. And ordinarily picketing of the site shared with a neutral employer is not forbidden. Nevertheless, the Board ruled that, in these circumstances, cessation of work by the employees of the neutral employer gave rise to an inference that picketing was directed against the neutral employer, as pressure for compliance with the Union's request, rather than against the primary employer. And because the Union took no affirmative action to inform employees of the neutral employer that the picket line was aimed soley at the primary employer,[1] the Board held this inference conclusive.

I do not think there is adequate support for the inference of illegality. The Board makes an unsupported inference and then imposes on the Union a duty to negate it by affirmative action. The employees of the neutral employer are free to support the Union out of feelings of solidarity. The law does not forbid the Union to receive such support. The Board's requirement of affirmative action is calculated to deprive the Union of that support. This, of course, seriously impairs the Act's basic policy not "to interfere with or impede in any way the right to strike." 49 STAT. 457 (1935), 29 U.S.C. § 163 (1952).

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[1] I read the court's opinion as requiring affirmative action by the Union only where there has been a request by the Union to the neutral employer not to accept deliveries from the primary employer and the neutral employer has refused.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 736

TRUCK DRIVERS AND HELPERS LOCAL UNION 728 (formerly Local Union 859) OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

The National Labor Relations Board, in its brief in opposition, has failed to answer the basic question in this case, namely, whether, in view of the special protections afforded picketing in Section 13 of the Act—such protections being available regardless of whether picketing is carried on at a place of employment where other neutral employers are also at work—the Board can be permitted to deny that right by the simple device of inferring through circumstances normally attending all picketing at a common situs of employment the existence of an object of involving neutrals as required by Sec. 8(b)(4) of the Act. If the Board can be permitted to rely on this type of circumstantial inference, then it would be an extremely easy matter

for it to find excuse to outlaw all picketing. That is precisely what the Board has proceeded to do. In a companion case to the present one *(General Truck Drivers, Chauffeurs, Warehousemen & Helpers Local 270, et al. and Robert L. Diaz, Jr., et al.,* 117 N.L.R.B. No. 132) the Board proscribed all picketing of a primary employer at a place where that employer's employees spent the major portion of their working day and restricted the union to picketing at the employer's garage where its employees spent less than 25 minutes of their time. Again, the Board did this solely on the basis of inferring an unlawful object from such circumstances as the ability to picket at another place of employment (the garage), the presence at the common situs of employees of neutrals who are members of another union known to be reluctant to cross picket lines, and the existence of an arrangement between a customer of the picketed employer (a motor carrier) and the union, entered into after all picketing had ceased and at the request of that customer, that, if the union resumed picketing, the customer would first be given an opportunity to unload its products and obtain the services of another carrier. The Board's decision in that case was reluctantly affirmed by the court below *(General Drivers Local 270, et al. v. N.L.R.B.,* Case No. 13,968, decided January 23, 1958, and as yet unreported). (A petition for writ of certiorari in that case has been prepared and will be filed with this Court as soon as the court enters its enforcement decree therein, which it is expected will be done within the next few days. Since that case is a companion case to the present one and presents identical issues, and since the same principles of the law are applicable to the two cases, it is respectfully requested that consideration of the instant petition for certiorari be deferred until the petition in the *General Drivers Local 270* case can be filed, which will be done immediately after the decree therein is entered. Counsel for the National Labor Relations Board have informed the undersigned counsel that the Board has no objection to this Court's considering

the two petitions together even though this might involve a delay in considering the petition in the instant case.)

Since Congress did not see fit to draw any distinction between picketing at a common situs or picketing at any other place which harbors a primary labor dispute, it is difficult to see why the Board should be permitted to make its own law on the subject, particularly in a field so fraught with controversy as that of Taft-Hartley. *Cf. Rabouin v. N.L.R.B.*, 195 F. 2d 906. While it is recognized that proof of violation of Section 8(b)(4), as well as proof of violation of any other section of the Act, need find support only in substantial evidence on the record considered as a whole, it is nevertheless submitted that "substantial evidence," when taken in context with the specific protections of Section 13, must involve something more than mere speculation or surmise when rights under that section are involved, and must, at the very least, require the Board to rely on clear evidence of an *actual,* not merely an inferred, object of deliberately seeking to extend the picketing against neutrals for the object of purposely involving a neutral's employees in the primary dispute, as distinguished from incidentally involving such employees as a consequence of such picketing. See *Pure Oil Co.*, 84 NLRB 315; *N.L.R.B. v. Service Trade Chauffeurs, Inc.*, 191 F. 2d 65.

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No. 736

In the Supreme Court of the United States

OCTOBER TERM, 1957

TRUCK DRIVERS AND HELPERS LOCAL UNION 728 (Formerly LOCAL UNION 859) OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari To the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari To the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The final opinion of the court below (Pet. 13-18) is reported at 249 F. 2d 512. Its prior opinion remanding the case to the Board for further consideration (R. 18-27) is reported at 229 F. 2d 514. The Board's original findings of fact, conclusions of law and order (R. 1-8) are reported at 110 NLRB 2192. Its supplemental decision, findings of fact, conclusions of law and order upon remand (R. 28-34) are reported at 116 NLRB 1020.

JURISDICTION

The judgment of the court below (R. 50) was entered on October 28, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that, in the circumstances of this case, the Union, by picketing various construction projects where employees of both the employer involved in a labor dispute with the Union and secondary employers were present, induced and encouraged the employees of the latter to engage in work stoppages in violation of Section 8(b)(4)(A) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. . . . (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . . .

* * * *

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

STATEMENT

A. *The Board's findings of fact.* The Board found that petitioner Union violated Section 8(b)(4)(A) of the Act when, in furtherance of a strike against Campbell Coal Company, it extended its picketing to construction projects of Campbell's customers. The evidentiary facts upon which the Board based its findings are set forth in a stipulation (R. 11-17) and may be summarized as follows:

Campbell Coal Company sells ready-mixed concrete and operates two plants in Atlanta, Georgia, from which its drivers deliver its product to construction sites. At these sites the truck drivers, at the direction of the contractors, unload the ready-mix into designated receptacles. The drivers spend approximately 25 percent of their working time at their employer's plants, 25 percent en route, and 50 percent at construction sites.

In June 1954, because of the discharge of a number of the truck drivers, the Union called a strike against Campbell Coal and picketed the two ready-mix plants. The pickets also followed trucks delivering ready-mix to various construction projects where the Union had no dispute with any of the contractors. The pickets carried signs which read:

> Employees of Campbell Coal Company on strike in protest of discharges against Union employees. Sales Drivers, Helpers and Building Construction Drivers, Local 859, AFL.

At each construction site the Union's agent advised the contractor or his representative of the dispute with Campbell Coal and asked him not to accept delivery of the concrete. If delivery was refused the Union took no further action. If accepted, however, the Union's agents picketed the immediate area of the trucks. The picketing continued so long as Campbell Coal's trucks remained on the construction site. In some instances employees of the contractors working on the construction projects quit work for the duration of the picketing, assigning as their reason the presence of the picket signs. The Union agents did

not inform employees who quit or other employees on the projects that the picketing was not intended as an appeal to them not to work.

B. *The Board's decision in the original proceeding.* The Board concluded that the Union, by picketing at the construction projects where secondary employers were located, induced and encouraged the latter's employees to strike, with an object of forcing their employers to cease doing business with Campbell Coal, thereby violating Section 8(b)(4)(A) of the Act. The Board based its finding of an illegal object upon the fact that since Campbell Coal, the employer involved in the labor dispute with the Union, had permanent places of business which could be and were being picketed by the Union, the extension of the picket line to the construction projects where secondary employers were engaged in work, necessarily was directed at the latter's employees for the purpose of inducing work stoppages by the latter's employees in violation of Section 8(b)(4)(A).[1]

C. *The decision of the court below in the original proceeding.* The court below in its initial opinion (R. 18) rejected, as too rigid and incompatible with the statute, the Board's ruling that where the separate premises of the primary employer afford the union an adequate opportunity for picketing, exten-

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[1] The Board viewed the case as governed by its previous rulings in *Washington Coca Cola Bottling Works, Inc.*, 107 NLRB 299, enforced *sub nom. Brewery and Beverage Drivers* v. *National Labor Relations Board*, 220 F. 2d 380 (C.A. D.C.), and *Thurston Motor Lines, Inc.*, 110 NLRB 748.

sion of the picket line to a site where secondary employers are also present constitutes, without more, a violation of Section 8(b)(4)(A). In the court's view, the "existence of a common site," the fact that picketing there would necessarily affect "employees of another," and the existence "of another place which can be picketed, are factors to be considered in determining whether or not the section has been violated, but alone are not conclusive." (R. 24)

Accordingly, the court, noting that the record before the Board contained "some additional facts" which were "not the subject of findings by the Board," remanded "the case to the Board for its further consideration, if desired" consistent with the views of the court (R. 20, n. 2, 27).

D. *The Board's decision and order after remand.* The Board, after considering the entire record in the case, concluded, as before, that the Union's picketing at the construction projects was aimed at the employees of the neutral employers, in violation of Section 8(b)(4)(A) of the Act. In so finding, the Board took into account not only the fact that the Union could have effectively picketed Campbell Coal at its own plants, but also the further circumstances (R. 31-32) that:

> Unable to cause a cessation of business between certain neutral contractors and the primary employer by direct appeals to the former, the Respondent [the Union] sought to accomplish that objective through a picket line appeal to employees of the secondary employers. Only those employers who refused to accede to the Respondent's demands that they cease doing business

> with Campbell Coal were picketed. When employees of these employers ceased working as a direct result of the picketing the picket line had accomplished the Respondent's previously revealed objective of putting pressure on neutral employers to force them to cease doing business with the primary employer. No attempt was made by the Respondent to inform striking employees that the picket line was aimed at Campbell Coal and not at the employees of neutral contractors.

The Board's order requires the Union to cease and desist from the unfair labor practices, and to post appropriate notices (R. 32).

E. *The decision of the court below in the proceedings after remand.* The court below, Judge Bazelon dissenting, concluded that the record considered as a whole furnished adequate evidentiary support for the Board's findings and that hence there was no basis for "repudiating the judgment of the Board that an object of the picketing * * * was within the proscription of section 8(b)(4)(A)" (Pet. 16). Accordingly, the court enforced the Board's order (Pet. 17).

ARGUMENT

The heart of petitioner's case is that the Board's finding that the Union engaged in conduct proscribed by Section 8(b)(4)(A) is without adequate evidentiary support in the record.[2] Section 8(b)(4)(A),

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[2] It may be noted that, contrary to petitioner's suggestion (Pet. 2) that Board findings must be supported by "clear and convincing evidence," the statute provides that such findings are entitled to acceptance by a reviewing court if

as this Court has recognized, represents a practical compromise between "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692. When a labor organization, engaged in a labor dispute with one employer (here Campbell Coal), pickets at a site where both the primary employer and secondary employers are present, and doing business with each other, the problem, for purposes of Section 8(b)(4)(A), is whether the immediate target of the picketing is the primary employer or the secondary, neutral employer. If the latter, the picketing is in violation of the Act. The issue thus presented, as the courts of appeals have uniformly held, is essentially one of fact to be determined from all the surrounding circumstances.[3] The resolu-

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supported by "substantial evidence on the record considered as a whole." Sec. 10(e).

[3] *National Labor Relations Board* v. *Business Machine and Office Appliance Mechanics, etc.*, 228 F. 2d 553 (C.A. 2), certiorari denied, 351 U.S. 962; *National Labor Relations Board* v. *Associated Musicians*, 226 F. 2d 900 (C.A. 2), certiorari denied, 351 U.S. 962; *National Labor Relations Board* v. *Truck Drivers & Helpers Local Union No. 728*, 228 F. 2d 791, 795 (C.A. 5); *National Labor Relations Board* v. *General Drivers, etc.*, 225 F. 2d 205 (C.A. 5), certiorari denied, 350 U.S. 914; *National Labor Relations Board* v. *General Drivers, etc.*, decided January 23, 1958 (C.A. 6); *Sales Drivers, Helpers & Building Construction Drivers, Local 859* v. *National Labor Relations Board*, 229 F. 2d 514 (C.A.D.C.), certiorari denied, 351 U.S. 972.

tion of this issue in the instant case adversely to petitioner presents no question worthy of further review by this Court.

Petitioner contends, however (Pet. 9), that the Board's finding of an illegal object on the part of the Union in picketing the construction projects is erroneous because the Board coupled "two separate activities of the Union each of them legal in itself to produce an alleged illegal purpose." The argument is that the Board relied solely on the Union's appeals to the secondary employers to refuse to accept deliveries from Campbell Coal which the Act does not outlaw, and also on the Union's picketing at the site where both Campbell Coal and the secondary employers were present which in and of itself is not necessarily unlawful. The argument is insubstantial. These two factors, as the Board's decision and the opinion below make clear (R. 30-32; Pet. 15), were only a part of "the combination of circumstances * * * considered by the Board in determining that an object of the picketing came within the object condemned by the secondary boycott section of the statute" (Pet. 16). In addition, even though the Act does not proscribe union appeals to an employer to refrain from doing business with another, as distinguished from inducement of his employees, it has been recognized that such appeals as the Union addressed to the secondary employers here may be used as evidence of the illegal object defined in Section 8(b)(4)(A).[4]

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[4] *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 193 F. 2d 421, 423-424 (C.A. 10); *National Labor Relations Board* v. *Local Union No. 55*, 218

Likewise, the fact that the Union picketed at the common site where secondary employers were present, plainly was a factor to be taken into account in determining whether, in the circumstances, the immediate targets of the picketing at the construction site were the neutral employers rather than Campbell Coal, particularly in view of the fact that the Union could have effectively picketed Campbell Coal at its principal places of business.

The cases cited by petitioner (Pet. 10-11) turn upon their particular facts and present no conflict in principle with the ruling below. Indeed, in originally remanding this case to the Board for further consideration, the court below adopted as its own (R. 25) the controlling principle enunciated in *National Labor Relations Board* v. *General Drivers, etc.*, 225 F. 2d 205 (C.A. 5), certiorari denied, 350 U.S. 914, one of the cases which petitioner cites (Pet. 10) as being in conflict with the holding below.

F. 2d 226, 231 (C.A. 10); *National Labor Relations Board* v. *Associated Musicians*, 226 F. 2d 900, 904 (C.A. 2), certiorari denied, 351 U.S. 962.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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